

TOB WENG KEONG & ANOR v. TOB CHEE HOONG

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COURT OF APPEAL, PUTRAJAYA

VERNON ONG LAM KIAT JCA

KAMARDIN HASHIM JCA

YEOW JEN KIE JCA

[CIVIL APPEAL NO: B-02(IM)(NCVC)-2526-12-2017]

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10 MAY 2019

SUCCESSION: Will – Validity – Testator made will in Cantonese through middle person – Testator instructed middle person on terms of will – Middle person conveyed testator’s Cantonese instructions in English to solicitor – Solicitor prepared will and explained contents to middle person who, in turn, translated them to testator in Cantonese – Whether testator had full knowledge and approved of will – Whether there was probability of miscommunication between parties – Whether there was probability that testator did not understand contents of will – Whether there were suspicious circumstances surrounding making of will – Whether suspicious circumstances dispelled – Whether will valid

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SUCCESSION: Will – Construction – Construction of clause in will – Testator made will appointing grandchildren as executors and beneficiaries – Allegation by grandchildren that will included current assets – Whether clause referred to all of testator’s properties – Whether clause in will should be construed to include testator’s current assets – Whether will clear, unambiguous and permitted several constructions of words – Whether there was mistake or miscommunication between parties – Whether will showed intention of testator to bequeath whole of his properties

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The appellants were the grandchildren of the deceased (‘the testator’). Before his death, the testator made a will, which was prepared by the family lawyer (‘Ashok’) and witnessed by one Miss Chen, appointing the appellants as the executors and beneficiaries. Following the testator’s death, the appellants proceeded to file an action, at the High Court, for a declaration that cl. 2 under the will included current assets and for probate to be granted to them. The respondent, the third son of the testator, challenged the validity of the will and disputed the appellants’ claim for the declaration sought. The High Court dismissed the appellants’ action on the grounds that (i) the will was not valid as there were suspicious circumstances in its execution as (a) the appellants were the only beneficiaries with each getting 50% share of the estate; (b) the instructions came from the second appellant, who similarly was the conduit in the explanation of the will to the testator; (c) there was no translation into Bahasa Malaysia of the will from Ashok; (d) Miss Chen could only confirm the testator signing the will; and (e) there was a possibility that the testator did not understand the contents of the will; and (ii) cl. 2 of the will referred to future assets and did not bear the meaning

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A ascribed to it by the appellants. Hence, the present appeal. The issues that arose for adjudication were (i) whether the will was invalidated on account of suspicious circumstances surrounding its making; and (ii) whether cl. 2 of the will should be construed to include the testator's current assets.

Held (allowing appeal in part)

B **Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:**

C (1) In order to dispel suspicious circumstances, the propounder must furnish affirmative proof of the testator's knowledge and approval, which must be strong enough, to satisfy the court in the particular circumstances. The greater the degree of suspicion, the stronger the affirmative proof must be to remove it. The High Court Judge ('HCJ') concluded that the appellants failed to dispel the suspicious circumstances because of the probability that the testator did not understand the contents of the will. The HCJ's surmise was misplaced. The HCJ overlooked the following established facts: (i) the testator wanted to make a will; (ii) the testator instructed the second appellant, in Cantonese, on the terms of the will; (iii) the second appellant conveyed the testator's instructions in English to Ashok; (iv) the testator called Miss Chen to witness the execution of his will; (v) Ashok prepared the will and explained its contents to the second appellant who, in turn, translated them to the testator in Cantonese; and (vi) the testator signed the will. The background facts leading to the execution of the will were sufficient to constitute proof of the testator's knowledge and approval of the will. (paras 50 & 51)

F (2) There was no challenge on the due execution of the will or that the will was tainted with fraud or undue influence or of any collusion between the appellants and Ashok. Nor was there any challenge on the testator's testamentary capacity. The HCJ arrived at an erroneous inference in holding that there was probability that the testator did not understand the contents of the will. Such an inference was plainly unfounded and unsustainable in law and in fact. On the established evidence, there was affirmative proof of the testator's knowledge and approval of the contents of his will. As such, the appellants succeeded in dispelling the suspicious circumstances surrounding the making of the will. The decision of the HCJ on this issue was set aside. The will had not been invalidated. (paras 52 & 69)

H (3) Clause 2 of the will was clear, unambiguous and did not permit of several constructions of the words. It referred to the testator's movable and immovable future assets. The opening words in the preamble to cl. 1 '... my properties/assets ...' could not be construed to refer to all

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of the testator's properties. The will was drawn up by Ashok, who took instructions from the second appellant, who, in turn, was instructed by the testator. It was unlikely that there was any mistake or miscommunication between the parties. The contents of the will was explained and translated to the testator; there was no question of the testator expressing any doubt or asking for clarification over the contents. This was not a will that showed an intention of the testator to bequeath of the whole of his properties. To adopt the construction of cl. 2, in the manner suggested by the appellants, would be tantamount to re-writing the will. The plain words of cl. 2 and the will should not be interpreted in a sense different from that which they bear, even if it appeared that the testator might have misunderstood the legal effect of the various species of gifts and the legal interpretation of the words may not carry out the intentions he had in mind. (paras 63 & 64)

Bahasa Malaysia Headnotes

Perayu-perayu adalah cucu si mati ('pewasiat'). Sebelum meninggal dunia, pewasiat telah membuat wasiat, yang disediakan oleh peguam keluarga ('Ashok') dan bersaksikan seorang bernama Cik Chen, melantik perayu-perayu sebagai wasi dan benefisiari. Berikutan kematian pewasiat, perayu-perayu seterusnya memfailkan satu tindakan, di Mahkamah Tinggi, untuk satu pengisytiharan bahawa kl. 2 wasiat termasuk aset-aset semasa dan agar probet diberi kepada mereka. Responden, anak lelaki ketiga pewasiat, mencabar kesahan wasiat dan mempertikai tuntutan perayu-perayu untuk pengisytiharan yang dipohon. Mahkamah Tinggi menolak tindakan perayu-perayu atas alasan (i) wasiat tersebut tidak sah kerana terdapat hal-hal keadaan yang mencurigakan kerana (a) hanya perayu-perayu yang menjadi benefisiarinya dengan setiap seorang mendapat bahagian sebanyak 50% dalam pusaka; (b) arahan datang daripada perayu kedua, yang juga orang tengah dalam menerangkan tentang wasiat kepada pewasiat; (c) tiada terjemahan Bahasa Malaysia wasiat tersebut oleh Ashok; (d) Cik Chen hanya boleh mengesahkan pewasiat menandatangani wasiat; dan (e) terdapat kemungkinan pewasiat tidak faham kandungan wasiat; dan (ii) kl. 2 wasiat merujuk pada aset-aset masa hadapan dan tidak mempunyai maksud seperti yang diberi oleh perayu-perayu. Maka timbul rayuan ini. Isu-isu yang timbul untuk diputuskan adalah (i) sama ada wasiat ditaksahkan akibat hal-hal keadaan mencurigakan yang menyelubungi buatannya; dan (ii) sama ada kl. 2 wasiat sepatutnya ditafsir agar menyertakan aset-aset semasa pewasiat.

Diputuskan (membenarkan sebahagian rayuan)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

- (1) Dalam melenyapkan hal-hal keadaan mencurigakan, pihak yang mengemukakannya harus mengemukakan keterangan afirmatif pengetahuan dan persetujuan pewasiat, yang mesti cukup kukuh, demi memuaskan mahkamah dalam hal-hal keadaan tersebut. Lebih hebat

- A kecurigaannya, lebih kuat lagi bukti afirmatif diperlukan demi menyangkalnya. Hakim Mahkamah Tinggi ('HMT') menyimpulkan perayu-perayu gagal melenyapkan hal-hal keadaan mencurigakan kerana kemungkinan pewasiat tidak faham kandungan wasiat. Tekaan HMT tersasar. Hakim Mahkamah Tinggi terlepas pandang fakta-fakta berikut:
- B (i) pewasiat ingin membuat wasiat; (ii) pewasiat mengarahkan perayu kedua, dalam bahasa Kantonis, tentang terma-terma wasiat; (iii) perayu kedua menyampaikan arahan pewasiat, dalam bahasa Inggeris, kepada Ashok; (iv) pewasiat memanggil Cik Chen untuk menyaksikan pelaksanaan wasiat; (v) Ashok membuat wasiat dan menerangkan kandungannya kepada perayu kedua yang, seterusnya, menterjemahkannya kepada pewasiat dalam bahasa Kantonis; dan (vi) pewasiat menandatangani wasiat tersebut. Latar belakang fakta yang membawa pada pelaksanaan wasiat cukup dalam membuktikan pengetahuan dan persetujuan tentang wasiat tersebut.
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- D (2) Tiada cabaran terhadap pelaksanaan wasiat atau bahawa wasiat tercemar dengan penipuan atau pengaruh tidak wajar atau apa-apa subahat antara perayu-perayu dan Ashok. Tiada juga apa-apa cabaran terhadap kapasiti pewasiat memberi keterangan. Hakim Mahkamah Tinggi membuat inferens yang cacat dalam memutuskan terdapat kemungkinan pewasiat tidak faham kandungan wasiat. Inferens sebegini tidak berasas dan tidak boleh dikekalkan bawah undang-undang dan berasaskan fakta. Berdasarkan keterangan yang terbukti, terdapat bukti afirmatif tentang pengetahuan dan persetujuan pewasiat dengan kandungan wasiat. Oleh itu, perayu-perayu berjaya melenyapkan hal-hal keadaan mencurigakan yang menyelubungi buatan wasiat. Keputusan HMT tentang isu ini diketepikan. Wasiat tersebut tidak ditaksahkan.
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- G (3) Klausula 12 wasiat jelas, tidak kabur dan tidak membenarkan beberapa tafsiran perkataan. Ini merujuk pada aset-aset boleh alih dan tak alih milik pewasiat. Perkataan-perkataan pembuka dalam mukadimah kl. 1 '... my properties/assets ...' tidak boleh ditafsir agar merujuk pada hartanah-hartanah pewasiat. Wasiat dibuat oleh Ashok, yang menerima arahan daripada perayu kedua, yang menerima arahan daripada pewasiat. Tidak mungkin terdapat apa-apa kesalahan atau salah komunikasi antara pihak-pihak. Kandungan wasiat diterangkan dan diterjemah kepada pewasiat; tiada persoalan tentang pewasiat menzahirkan apa-apa keraguan atau meminta penjelasan tentang kandungannya. Ini bukan wasiat yang menunjukkan niat pewasiat mewasiatkan semua hartanahnya. Mentafsir kl. 2, dengan cara yang dicadangkan oleh perayu-perayu, sama seperti menulis semula wasiat tersebut. Perkataan-perkataan kl. 2 dan wasiat tersebut tidak sepatutnya ditafsir dalam maksud sebenarnya, jika pun pewasiat kelihatan tersalah faham kesan undang-undang pelbagai jenis dan hadiah dan tafsiran undang-undang perkataan tersebut mungkin tidak melaksanakan niat dalam fikirannya.
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Case(s) referred to:

- A-G v. Williams* (1794) 2 Cox Eq Cas 387 (*refd*) A
Abbot v. Middleton [1858] 7 HLC 68 (*refd*)
Barry v. Butlin [1838] 12 ER 1089 (*refd*)
Barry v. Butlin [1838] 1 CURT 223 (*refd*)
Battan Singh v. Amrichand [1948] AC 161 (*refd*)
Benn v. Benn [1885] 29 Ch D 839 (*refd*) B
Booth v. Booth (1799) 4 Ves 399 (*refd*)
Boyes v. Cook [1880] 14 Ch 53 (*refd*)
Brown v. Fisher [1890] 63 LT 465 (*refd*)
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC (*refd*)
Collins v. Elstone (1893) P 1 (*refd*) C
Constable v. Tufnell (1833) 4 Hag Ecc 465 (*refd*)
Cushway v. Harris [2012] EWHC 2273 (*refd*)
David Wee Eng Siew v. Lim Lean Seng & Anor [2014] 1 CLJ 299 FC (*refd*)
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC (*refd*)
Drake v. Drake (1860) 8 HL Cas 172 (*refd*)
Edgeworth v. Edgeworth (1869) LR 4 HL 35 (*refd*) D
Enobin v. Wylie (1862) 10 HL Cas 1 (*refd*)
Fincham v. Edwards (1842) 3 Curt. 63 (*refd*)
Franks v. Sinclair [2006] EWHC 3365 (*refd*)
Fulton v. Andrews [1875] LR 448 (*refd*)
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC (*refd*)
Gnambal Ammal v. Raju Ayyar AIR (38) 1951 Sup Ct 103 (*refd*) E
Goodman v. Goodman (1847) 1 De G & Sm 695 (*refd*)
Hall v. Hall (1892) 1 Ch 361 (*refd*)
Hall v. Warren (1861) 9 HL Cas 420 (*refd*)
Hastilow v. Stobie (1865-69) LR 1 P & D 64 (*refd*)
Higgins v. Dawson [1902] AC 1 (*refd*)
Hunt, In the Goods of (1875) 3 P & D 250 (*refd*) F
Ibbetson v. Beckwith (1735) Cas temp Talb 157 (*refd*)
In re Harrison [1885] 30 Ch D 390 (*refd*)
In The Estate Of Sevatha Vappoo Maricar Otherwise Called Kavena Sayna Savatha Vappoo Maricar, Deceased [1940] 1 LNS 27 HC (*refd*)
Jones v. Jones [1906] 1 Ch 570 (*refd*)
Low v. Guthrie (1909) AC 278 (*refd*) G
Marley v. Rawlings [2015] AC 129 UKSC (*refd*)
Meyer, In the Estate of [1908] P 353 (*refd*)
Midland Counties Rly v. Oswin (1844) 1 Coll 74 (*refd*)
Montgomerie v. Woodley (1800) 5 Ves 522 (*refd*)
Musgrove, In the Estate of [1927] P 264 (*refd*)
Pentakota Satyanarayan v. Pentoka Seetharatnam AIR 2005 SC 4362 (*refd*) H
Perrin v. Morgan [1943] AC 399 (*refd*)
Philipps v. Chamberlaine (1789) 4 Ves 51 (*refd*)
Pinney v. Marriot (1863) 32 Beav 643 (*refd*)
Re Ashkettle [2013] EWHC 2125 (*refd*)
Re Bailey [1951] Ch 407 (*refd*) I
Re Bassett's Estate (1872) LR 14 Eq 54 (*refd*)

- A** *Re Benn, Benn v. Benn* (1885) 29 Ch D 839 (*refd*)
Re Edmondson's Estate (1868) LR 5 Eq 389 (*refd*)
Re Edwards [1906] 1 Ch 570 (*refd*)
Re Estate of Tkaczuk Dobryden v. Wagner [2004] 7 ITELR 496 (*refd*)
Re Harrison (1885) 30 Ch D 390 (*refd*)
Re Harte [2015] EWHC 2351 (*refd*)
- B** *Re Henton* (1882) 6 Madd 343 (*refd*)
Re Hobson [1912] 1 Ch 626 (*refd*)
Re Horrocks [1939] P 198 (*refd*)
Re Hume, Public Trustee v. Mabey [1912] 1 Ch 693 (*refd*)
Re Lee Chew Kuen, Decd [1968] 1 LNS 183 (*refd*)
Re Methuen and Blore's Contract (1881) 16 Ch D 696 (*refd*)
- C** *Re Morris* [1971] P 62 (*refd*)
Re Powell [1918] 1 Ch 407 (*refd*)
Re Rowland [1963] Ch 1 (*refd*)
Re Wragg [1959] 2 All ER 717 (*refd*)
Re Wynn [1983] 3 All ER 310 (*refd*)
- D** *Royle v Hamilton* (1799) 4 Ves 437 (*refd*)
RSPCA v. Sharp [2010] EWCA Civ 1474 (*refd*)
Sarat Kumari Bibi v. Rai Sakhi Chand [1929] AIR PC 45 (*refd*)
Sharp v. Hutchins [2015] EWHC 1240 (*refd*)
Tanner v. Public Trustee [1973] 1 NZLR 68 (*refd*)
Tay Seck Loong & Ors v. Teh Chor Chen & Ors [2005] 8 CLJ 686 HC (*refd*)
- E** *Taylor v. Frobisher* (1852) 5 De G & Sm 191 (*refd*)
Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA (*refd*)
Tyrell v. Painton [1894] P 151 (*refd*)
William Forester Charter v. Charles Charter [1874] LR 364 (*refd*)
Wintle v. Nye [1959] 1 All ER 552 (*refd*)
- F** **Legislation referred to:**
Evidence Act 1950, s. 100
Wills Act 1959, s. 30(3)
- Other source(s) referred to:**
Halsbury's Laws of Malaysia, vol 11(2), para 330.114-117
Theobald on Wills, 18th edn, pp 65, 309
- G** *For the appellant - Cyrus Das & Max Yong BS; M/s Shui Tai*
For the respondent - Lambert Rasaratnam, Chan Mun Yew & Daryl Khor Tet Woei;
M/s Kheng Hoe
- [Editor's note: For the High Court judgment, please see *Tob Weng Keong & Ors v. Tob Chee Hoong* [2017] 1 LNS 1966 (overruled in part).]
- H** *Reported by Najib Tamby*
- I**

JUDGMENT

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Vernon Ong Lam Kiat JCA:

Introduction

[1] The testator had three sons Tob Chee Mun, Tob Chee Choong and Tob Chee Hoong. Choong's children Tob Weng Keong ("Keong") (first plaintiff), Tob Weng Kin ("Kin") (second plaintiff) and a daughter have always lived with their grandfather and grandmother together with Mun's wife and daughter up to the testator's demise.

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[2] On 30 July 2013, the testator had been admitted to Institut Jantung Negara (IJN) for an operation. On 13 August 2013 the testator made a will under which Keong and Kin were appointed as the executors and beneficiaries under the will. The will in question was prepared by the family lawyer Ashok Kumar Puri ("Ashok").

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[3] A heart operation was performed on the testator on 14 August 2013. Unfortunately, the testator succumbed to post-operation complications and passed away on 3 September 2013. The testator was survived by his wife Teo Ah Chai @ Kor Mui Lai (who passed away subsequently on 21 February 2016), his three sons and grandchildren.

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[4] After the testator's demise, Keong and Kin filed an action at the High Court for a declaration that cl. 2 under the will included current assets and for probate to be granted to them. The defendant Tob Chee Hoong, the third son of the testator challenged the validity of the will on the ground that there were suspicious circumstances surrounding the making of the will and disputed Keong and Kin's claim for the declaration sought.

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[5] After a full trial, the learned judge dismissed Keong and Kin's action. The learned judge found that (i) the will is not valid as there were suspicious circumstances in its execution and (ii) that cl. 2 of the will referred to future assets and did not bear the meaning ascribed to it by Keong and Kin. This is Keong and Kin's appeal against the decision of the High Court. In this judgment, the parties shall be referred to as they were in the High Court.

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[6] The testamentary capacity of the testator was not in issue in this appeal. The two main issues in this appeal relate to the following questions:

- (i) whether the will was invalidated on account of suspicious circumstances surrounding the making of the will, and
- (ii) whether cl. 2 of the will should be construed to include the testator's current assets.

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A Decision Of The High Court

[7] Altogether six suspicious circumstances surrounding the making of the will were alleged by the defendant, *to wit*, (i) the prime mover of the will is the main beneficiary and the only conduit of communication who understood everything that happened, (ii) who was there during the signing of the will, (iii) what happened to the will after its signing, (iv) change in format of the will, (v) the choice of witnesses for the will was unreliable, and (vi) who requested for the medical certificate provided by Dato Dr David Chew Soon Ping (PW5). The learned judge ruled that whilst item (i) was established the remaining five suspicious circumstances itemised above as (ii), (iii), (iv), (v) and (vi) were not proved.

[8] The learned judge found that there were suspicious circumstances because Kin was not only the prime mover, he was also the main beneficiary of the will and the only conduit of communication. Her decision was grounded on the following findings:

- D (a) Ashok's evidence that he took instructions directly from the testator on 12 August 2013 to prepare the will is at variance with Kin's evidence that the testator had given him specific instructions to convey to Ashok on 13 August 2013 morning to prepare the will and he then conveyed them to Ashok by phone on the same day;
- E (b) Ashok's evidence is also at variance with Keong's evidence that the testator told him that he had given instructions to Kin on the will and there was no mention of Ashok being instructed too and on a day earlier;
- F (c) Ashok's evidence that he took instructions directly from the testator on 12 August 2013 to prepare the will is not to be believed;
- (d) Kin's evidence that Ashok explained the will to him in English and he then translated to the testator in Cantonese is at variance with Ashok's evidence that he explained the will to the testator in Bahasa Malaysia and he then asked Kin to translate;
- G (e) The testator instructed Kin in Cantonese on the will and Kin conveyed the instructions to Ashok in English, the will was explained in English by Ashok to Kin and Kin translated to the testator in Cantonese;
- H (f) Kin had agreed he was a conduit to the communication and if there was a miscommunication between what the testator told him and what he told Ashok neither Ashok nor the testator would know about it and nobody would know except Kin;
- I (g) Kin also agreed that he played a critical, crucial and instrumental role in the drafting of the will;

- (h) “The suspicious circumstances must be viewed in the context of Kin and Keong being the only beneficiaries with each getting 50% share of the estate. The instructions came from Kin as the conduit who similarly was the conduit in the explanation of the will to testator. There was no translation into Bahasa Malaysia of the will from Ashok to testator as this was not supported by the evidence of Kin and Keong. Ashok can only testify to what Kin told him were instructions from testator. PW4 who was the other witness to the will could only confirm testator signing the will.”; and A
- (i) The probability that testator did not understand the contents of the will. B
- [9] The learned judge refused to grant the declaration on cl. 2 of the will on the following grounds: C
- (a) “clause 2 is clear and not doubtful”. It means what is stated therein namely “all my movable and immovable future assets”; D
- (b) It was probable that there could be a contemplation of future assets as the testator wanted to undergo surgery in order not to die and the testator had some reasonable expectation to recover from the operation; E
- (c) The presumption against intestacy does not apply; F
- (d) The court looks at the actual words of the will regardless of the intention of the testator; and G
- (e) The debts owed by two family companies (Teleton Enterprise Sdn Bhd (“Teleton”) and Orchard Circle Sdn Bhd (“Orchard Circle”)) which were incurred before the execution of the will are not future assets as they have already been incurred and were treated as current assets in the companies’ accounts. H

Plaintiffs’ Submission

[10] Before us, learned counsel canvassed two primary issues: (i) the validity of the will and (ii) the proper construction to be given to cl. 2 of the will. On the first issue, learned counsel for the plaintiffs argued that the will was struck down on the sole ground that it was made on suspicious circumstances. He argued that the circumstances surrounding the making of the will were neither unusual nor suspicious. In his will, the testator provided that the grandmother and the others continue to stay and occupy the family home as long as they wish and further that the property was not to be sold. I

[11] Learned counsel submitted that the learned judge found that Kin was the conduit in not only the making of the will but also in the reading and explaining of the will to the testator. As to the making of the will, learned counsel argued that the will was prepared by the family lawyer Ashok; Ashok was also a witness to the will along with one Ms Chen, a long serving employee and accountant of the family company. The testator had personally

A called Ms Chen to be present at IJN to witness the will. The will was brought to IJN by Ashok and it was read over to the testator by Kin and Ashok. Learned counsel argued that the learned judge focused on a very narrow area in finding suspicious circumstances, ie, whether the instructions for the will was given by the testator directly to Ashok or whether Ashok received the instructions from Kin. As such, the dispute relates to the question of who gave instructions for the will. Invariably, it is a case of faulty recollections as to what really happened.

[12] As to the reading and explaining of the will to the testator, learned counsel argued that Kin had read the will to the testator in Cantonese – which fact was accepted by the learned judge. But the learned judge rejected Ashok's evidence that he also explained the terms of the will to the testator in BM and partly in English; the learned judge found that Kin was the one who read over the will to the testator.

[13] Learned counsel then argued that the learned judge did not apply the recognised test for finding suspicious circumstances and misapplied the law. Faulty recollection is by itself not a ground for striking down a will. The learned judge should have looked at the overall surrounding circumstances in the making of the will. There is no suggestion that the testator was not of sound disposing mind. There was no challenge on the due execution of the will. There was no challenge that the will was tainted with fraud. There was no suggestion of any collusion between Ashok the solicitor who prepared the will and the plaintiffs as the principal beneficiaries under the will. The sole and single ground on which the will was struck down was on the basis that Kin was the conduit.

[14] Learned counsel for the plaintiffs also argued that the challenge against the will came late in the day and that it was a tentative afterthought by the defendant, the testator's third son. The question was whether the dispositions made under the will were natural for the testator to make or unnatural for the testator to have made. It is not in dispute that the testator loved the plaintiffs dearly. It is also not in dispute that there was bad blood between the testator and the plaintiffs on the one hand and the defendant on the other hand. When the defendant was shown the will, he admitted that it was natural for the testator to do that. The defendant did not challenge the validity of the will. His initial objections in his caveat filed in court related to RM5 million owed by Teleton and Orchard Circle to the estate which would have gone to the plaintiffs. As such, the defendant did not ask the will to be invalidated due to suspicious circumstances but rather on the ground that the monies owed by the companies in question should not go to the estate of the testator.

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[15] Learned counsel then alluded to the fact that the defendant lodged the probate caveat on the sole ground that the debts owed by the two family companies should not form part of the estate; there was no challenge on the validity of the will. The originating summons filed by the plaintiffs primarily related to the construction of cl. 2 of the will; but as the proceedings went along and affidavits were filed and exchanged between the parties, and in particular in the defendant's fifth affidavit, the allegation that the will was made in suspicious circumstances were first made. As such, the question of challenging the will came up tentatively. There was a history of bad blood between the plaintiffs and the defendant – the defendant had lodged a police report against the plaintiffs over the use of family company's funds to pay the medical expenses of their grandmother.

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[16] The defendant accepted that it was natural for the testator to leave the family home to the grandmother and family living in it. Further, the testator had during his lifetime transferred 40% of the shares in the family companies to the plaintiffs; as a result, the family companies came under the control of the plaintiffs and their father, the plaintiffs holding 40%, their father 30% and the balance 30% held by the defendant. The abovementioned shows the love and affection the testator had for the plaintiffs. Therefore, when the will was made by the testator, it was most natural for the testator to instruct Kin on the making of the will and also most natural for the family solicitor to be instructed to prepare the will. As such, the circumstances were insufficient to justify the learned judge's finding of suspicious circumstances in the making of the will.

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[17] It was submitted that the learned judge's conclusion in para. [33] of her written judgment that "Kin ... was the conduit to the communication, that if there was a miscommunication between what the testator told him and what he told Ashok neither Ashok nor testator would know about it and nobody would know except Kin, and that Kin played a critical, crucial and instrumental role in the drafting of the will", are wholly speculative as they are premised on hypothetical questions put to Kin. The learned judge failed to apply the proper test of suspicious circumstances which is whether there is something abnormal or out of the ordinary in the context of the making of the will (*Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61 (FC) at 73; *Barry v. Butlin* [1838] 12 ER 1089; *Low v. Guthrie* (1909) AC 278 HL; *Pentakota Satyanarayan v. Pentoka Seetharatnam* AIR 2005 SC 4362). Instead of examining all the surrounding circumstances of the case, the learned judge focused on the narrow area of faulty recollection as to how the instructions were given and as to how the will was read over to the testator; as such it was argued that the learned judge took an approach which was too narrow (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC)). Ultimately, the question of whether the testator gave instructions to Kin or to Ashok or to both of them and whether Kin and or Ashok read over the will to the testator is not material so long as the fact that the testator wanted to make the will is not in dispute.

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- A [18] Learned counsel then addressed us on the second issue – the proper construction to be given to cl. 2 of the will. He argued that looking at the will as a whole, it was the manifest intention of the testator to will the properties to his two grandsons who lived with him. The learned judge erred in looking at the actual words of the will regardless of the intention of the
- B testator and that the case cited by the learned judge did not support the proposition. As such the learned judge failed to apply the two basic principles of construction of wills, the first of which is to give effect to the intention of the testator. The second is that where a testator has made a will, there is a presumption against partial intestacy.
- C [19] Clause 2 read literally without regard to the manifest intention of the testator would include only future assets but exclude all current movable and immovable assets. On the facts of this case, apart from the family home the testator’s assets consisted of other movable and immovable properties including testator’s half-share in two landed properties, cash in bank and cash
- D debts of RM5 million owing to him from the family companies, all of which have been listed in the list of assets. If the assets contained in the list of assets are applied to a literal interpretation of cl. 2 as the learned judge did, none of these assets would be covered as they would not be future assets and they would go into intestacy. According to the defendant, these assets should go
- E to him and his two brothers. It was submitted that that could not possibly have been the manifest intention of the testator.
- [20] Something has gone wrong with cl. 2; as such cl. 2 cannot be read literally. Clause 2 is also contradictory as it says “... not specifically mentioned in the paragraph above ...” because the paragraph in question
- F referred to the family home which is a current asset and not a future asset. Learned counsel argued that the opening words in the form of a preamble to cl. 1 “I hereby give and bequeath my properties/assets as follows:” was also intended to cover cl. 2. However, if cl. 2 is read literally to refer only to “future assets” it simply means that the current assets of the testator, other
- G than the family home mentioned in cl. 1, are not covered by cl. 2 and would go into intestacy. On intestacy the other assets would fall to be inherited by persons whom the testator had chosen not to bequeath any properties under the will. The testator could never have intended that all the current assets apart from the family home should go into intestacy.
- H [21] Further, cl. 4 suggests strongly and reaffirms that the testator wanted only his two grandsons to benefit from all his assets; and that if any one of his two grandsons predeceased him, then all the assets would be given to the surviving grandson thereby leaving no room for the testator to take the property as suggested by the defendant. The testator had three sons, Mun (estranged), Chun (plaintiffs’ father) and Hoong the defendant. Chun’s
- I children have always lived with their grandfather together with Mun’s wife and daughter and the plaintiffs’ sister up to the time of the testator’s death.

The only two able-bodied males staying with the testator were the two grandsons. It is also notable that the will stipulates that the family home shall not be sold, charged, mortgaged, rented out and none of those persons mentioned shall be evicted from the family home and shall be allowed to stay and occupy the family home for as long as they wish. As a result of the will being struck out, the family home goes and it will have to be divided to those entitled on intestacy and be sold; thereby destroying the manifest intention of the testator. It was therefore submitted that the inherent contradiction in cl. 2 read together with the opening word in the preamble to cl. 1 and cl. 4 would clearly suggest that it was the testator's intention that all his current assets should go to the grandsons. Read otherwise, it would also mean that the RM5 million owing to the testator from the two family companies would also go on intestacy such that it would no longer go to his estate but open for distribution to other family members contrary to the intention of the testator. To underscore the above argument, learned counsel submitted that during the testator's lifetime, the testator had transferred his 40% shares in the family companies to the grandsons; it follows that the RM5 million debt owing by the family companies to the testator would likewise go to the estate rather than to intestacy.

[22] Accordingly, it was argued that cl. 2 must be read as covering all assets – current movable assets, current immovable assets and future assets. The comma that should appear after “immovable” must have been omitted typographically. Further, it was contended that the word “and” was inserted wrongly and that it should have been “... all my movable, immovable and future assets”.

[23] It is possible for the court to construe a clause in a will to accord with what the court determines is the manifest intention of the testator – the armchair rule of interpretation of a will suggested by James LJ in *Boyes v. Cook* [1880] 14 Ch 53, 56 as applied by Lord Neuberger in *Marley v. Rawlings* [2015] AC 129 UKSC. The literal approach should be avoided and in the event of ambiguity in a will the factual context of the testator's intention drawn from his overall family and business relationships at the time of the will should be considered (*Gnambal Ammal v. Raju Ayyar* AIR (38) 1951 Sup Ct 103; *William Forester Charter v. Charles Charter* [1874] L.R. 364, 386).

[24] Learned counsel also argued that the doctrine of presumption against intestacy is crucial on the construction of cl. 2, especially given the opening words in the preamble to cl. 1 that manifested the testator's intention to give all his assets under the will. Citing *Halsbury's Law of Malaysia*, it was submitted that where the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary construction. Where the will shows an intention of the testator to dispose of the whole of his property, but, as regards the

- A interests created, two constructions are possible, according to one of which the will effects a complete disposition of the whole, but according to the other the will leaves a gap, the court inclines to the former construction. Introductory statements setting out the testator's intention to dispose of all his worldly estate, or the appointment of executors, or the fact that the
- B objects of the testator's bounty are his wife and all his children, his eldest son being treated alike with the rest, are strong indications in favour of a universal disposition for all the testator's property. The presumption applies with particular force to the construction of a residuary gift; where the residue is given, every presumption is made that the testator did not die intestate.
- C [25] Adopting what Lord Esher MR described as a golden rule of construction in *In re Harrison* [1885] 30 Ch D 390, learned counsel argued that the court is entitled to construe ambiguous clause in a re-worded manner; such that one must assume that a testator who has executed a will in solemn form did not intend to die intestate when he has gone through the
- D form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This approach was adopted in *Re Lee Chew Kuen, Decd* [1968] 1 LNS 183; [1968] 1 MLJ 112 where the court went a step further to "supply" missing words to make clear the intention of the testator so as to engage the principle against presumption against intestacy.
- E In *Re Harte* [2015] EWHC 2351, the ambiguity was whether the phrase 'residuary estate' in the will should be construed to include real property and not just personal property. If it were otherwise a principal asset would not be inherited by the beneficiary. The English court held that it was inherently unlikely that having made a will to dispose her properties that the testatrix intended to omit her real property from the will. Learned counsel argued that
- F the facts in *Re Harte (supra)* are similar to this case; and that it can be gathered from the surrounding circumstances that the testator intended to dispose of all his assets and that the residuary estate stated under cl. 2 should not be confined to future assets only but read to include all movable and immovable current assets.
- G **Defendant's Submission**
- [26] In reply, learned counsel for the defendant argued it has not been shown that the learned judge was plainly wrong in arriving at her decision. The primary issue is an issue of fact which is a finding of the learned judge
- H who had the audio and visual advantage. The subsidiary issue relating to the construction of cl. 2 is a mixed question of law and fact.
- [27] In the plaintiffs' probate application, only the family home and the future assets (RM5 million debts owing by the family companies to the testator) were listed as the assets of the estate. Subsequently, the plaintiffs
- I amended their application to include a prayer that cl. 2 be construed so as

to include three additional items, (i) a half share of a parcel of land in Kuala Lumpur valued at RM6 million, (ii) a half share or a parcel of land in Klang valued at RM700,000 and cash in various bank accounts. In so doing, the plaintiffs now wanted the whole estate of the testator.

[28] In the first instance, the defendant had no issue with the validity of the will and the bequest of the family home. He only took issue with the classification of the debts owed by the family companies as future assets. However, after the defendant took issue on the validity of the will the court ordered the OS to be converted into a writ and the affidavits to stand as pleadings.

[29] The defendant opposed the probate application on two grounds. First, the will is invalid due to the presence of suspicious circumstances surrounding the making of the will. Second, even if the will is valid, cl. 2 is not ambiguous. It only bequeaths any future assets of the testator to the plaintiffs. On the facts, none of the assets contained in the list of assets fall within the ordinary meaning of “future assets” in cl. 2.

[30] The learned judge found evidence of suspicious circumstances based exclusively on Kin’s own evidence that the testator instructed him in Cantonese and that thereafter Kin conveyed the instructions to Ashok; Ashok explained the terms of the will to Kin in English and Kin explained to the testator in Cantonese. As such, Kin was the sole conduit of communication between Ashok and the testator. The learned judge also found that Ashok’s evidence could not be reconciled with Kin’s evidence that Ashok took instructions from the testator on 12 August 2013 to prepare the will and that he explained the will to the testator in Bahasa Malaysia on 13 August 2013. Faced with two conflicting versions as to when and to whom and in what language the instructions were given, the learned judge found that Ashok’s evidence was not corroborated by Kin, Keong or Ms Chen who were present during the execution of the will. Ashok’s evidence was also not corroborated by any documentary evidence. Taking this background into context and the fact that the plaintiffs were the sole beneficiaries under the will, the learned judge found that the testator had not understood the contents of the will.

[31] It was also argued that where the validity of a will is challenged on grounds of suspicious circumstances, the burden falls on the plaintiffs as the propounders of the will (*Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (FC)). The fact that Kin was involved in the preparation of the will is in itself a suspicious circumstance such that the court should be vigilant in examining the evidence so as to be judicially satisfied that the will expresses the intention of the testator (*Barry v. Butlin* [1838] 1 CURT 223 (PC)). The evidence of the propounders who are also the main beneficiaries of the will alone is insufficient to show a testator knew and approved of the contents of the will (*Tyrell v. Painton* [1894] P 151; *Fulton v. Andrews* [1875] LR 448; *Brown v. Fisher* [1890] 63 LT 465).

- A [32] Learned counsel emphasised that the inherent contradictions between Kin's and Ashok's versions show that there was something odd in the preparation of the will that would raise suspicious circumstances and require the court to scrutinise the evidence and be satisfied that there was no suspicious circumstances. Whilst conceding that natural dispositions may
- B negate suspicious circumstances, learned counsel argued that the gifting of the entire estate is not consistent with the natural disposition since there was no evidence to show that it was a natural disposition. Kin had admitted under cross-examination that he was not the only one who enjoyed a special relationship with the testator. There was no evidence to support the
- C allegation of bad blood between the defendant and the testator; the defendant was living with the testator until he was sent to Singapore for further studies. The defendant's residence was only a few minutes away from the family home.
- D [33] The gifting of the 40% shares in the family companies to the grandsons do not support the argument that the bequest of the entire estate to the grandsons was a natural disposition of the testator. In fact, the testator had also previously gifted 30% of the shares to the defendant. Further, whether there was bad blood between the plaintiffs and the defendant is irrelevant. The real question is the relationship between the testator and the defendant. There is no cogent reason to show why the majority of beneficiaries were excluded.
- E [34] The following submission relates to the construction of cl. 2. Learned counsel argued that the will must be construed according to the natural meaning borne by the words in the will (*Higgins v. Dawson* [1902] AC 1 HL; *In the Estate of Sevatha Vappoo Maricar* [1940] 1 LNS 27; [1940] 1 MLJ 65).
- F [35] The opening words in the preamble to cl. 1 of the will do not refer to 'all' assets. There is absolutely no ambiguity in the language of cl. 2; it plainly means what is stated – the testator bequeathed his future assets to the plaintiffs. There is no basis in law for the plaintiffs' argument that cl. 2
- G should be construed to mean – movable, immovable and future assets of the testator. The plaintiffs' interpretation is tantamount to re-writing the will from "All my movable and immovable future assets ..." to "All my movable, immovable and future assets ..." A court is not entitled to make a fresh will for a testator merely because it strongly suspects the testator did not mean what is plainly stated in the will (*Perrin v. Morgan* [1943] AC 399; *Tay Seck Loong & Ors v. Teh Chor Chen & Ors* [2005] 8 CLJ 686; [2005] 7 MLJ 612). Inserting a comma after word 'movable' and the word 'and' after word immovable' changes the character of the will from one to another altogether. If that was the testator's intention there would not have been any need for
- H cl. 2; cl. 1 would have provided for all the assets thereby rendering cl. 2
- I redundant.

[36] The presumption against partial intestacy only applies in cases where there is obscurity or ambiguity in the language of the will. It cannot be used to strain plain words in a will to give them a meaning wider than intended (*Re Estate of Tkaczuk Dobryden v. Wagner* [2004] 7 ITELR 496; *Benn v. Benn* [1885] 29 Ch. D 839; *Halsbury's Laws of Malaysia*, vol 11(2) para. [330.114]). Given the plain and clear language of cl. 2, there is no room for the presumption to apply. To underscore this argument, learned counsel alluded to the contemporaneous conduct of the plaintiffs. The plaintiffs understood cl. 2 to bequeath to them only the future assets of the testator. In the original list of assets and liabilities and the list of beneficiaries filed in the probate application, the plaintiffs did not include the current movable and immovable property of the testator. About a month after the probate application was filed, the plaintiffs applied to amend the OS to include a prayer that cl. 2 be construed to bequeath the entire estate of the testator to the plaintiffs. The testator's current movable and immovable assets were also added to the list of assets. No proper explanation was given for this sudden change in position by the plaintiffs or the omission of the testator's movable and immovable assets from the original list of assets. As such, the learned judge was correct in her construction of cl. 2.

[37] Lastly, learned counsel argued that the debts owed by the family companies are not future assets as the audited financial statements of the family companies clearly show that the debts were incurred prior to the execution of the will and specifically listed as current liabilities of these companies. Mr. Tee Tian Kee a licensed auditor testified that from an accounting perspective, any debt owing to a person would constitute a "receivable", which is a form of current asset. This fact was also acknowledged by Kin under cross-examination.

Our Decision

[38] At the outset, it is pertinent to reiterate that the testamentary capacity of the testator is not in issue. The principal issues in this appeal relates to two questions: (i) whether the will is invalidated on account of suspicious circumstances surrounding the making of the will, and (ii) whether cl. 2 should be constructed to include the testator's current assets.

(i) Whether There Were Suspicious Circumstances Surrounding The Making Of The Will? If So, Whether The Plaintiffs Have Succeeded In Dispelling The Suspicious Circumstances

[39] Before addressing the arguments on the first issue, we think that it is pertinent to reiterate the basic rule that the legal burden of proving testamentary capacity and due execution of the will is on the propounder of the will. Put another way, the person propounding a will must prove that the testator knew and approved of its contents at the relevant time. The

A propounder also bears the burden of proof of dispelling any suspicious circumstances surrounding the making of the will; however, the onus of proving any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will (*Gan Yook Chin (supra)* at 322).

(*What In Law Are Suspicious Circumstances?*)

B [40] The question of suspicious circumstances in the making of a will is relevant in the context of the testator's knowledge and approval of the contents of a will. A testator must know and approve of the contents of his will. Underlying this rule is the rationale that a will must be the result of a testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them
C (*Constable v. Tufnell* (1833) 4 Hag. Ecc. 465). If the contents of a will originate from another person and the testator executes it in ignorance of its contents, the will is invalid (*Hastilow v. Stobie* (1865-69) LR 1 P & D 64).

D [41] English common law suggests that whilst the testator must know and approve of the contents of his will, he need not know its legal effect. Thus, if the testator does know and approve of the contents of his will, it is immaterial that he, or the draftsman employed by him, is mistaken as to its legal effect. In *Collins v. Elstone* (1893) P. 1, there was a mistake as to the legal effect of a revocation clause in a printed will form and in *Re Horrocks* [1939]
E P. 198, the use of word "or" instead of "and", in gift to charitable or benevolent objects was the solicitor's deliberate choice under mistake as to its legal effect.

[42] It is also a recognised principle the testator must know and approve of the contents of his will at the time when he executes it (*Hastilow v. Stobie (supra)*). It also suffices if the testator knows and approves of the contents of the instructions which he gives to a solicitor for the preparation of a will provided (i) the will is prepared in accordance with his instructions, and (ii) at the time of execution he understands that he is executing a will for which he has given instructions. However, this principle must be applied
G with the greatest caution where the testator gives instructions to a lay intermediary, who in turn repeats them to the solicitor (*Battan Singh v. Amrichand* [1948] AC 161).

[43] In the context of wills, suspicious circumstances are circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator (*Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90 (CA) at 96). *Theobald on Wills* 18th edn at p. 65 under the heading of "Knowledge and approval of contents of will" is particularly instructive:

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(c) Suspicious circumstances

If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate *unless that suspicion is removed by affirmative proof of the testator's knowledge and approval*. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms for the will to the testator and instructing a solicitor chosen by that person.

However, *circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstances attending, or at least relevant to, the preparation and execution of the will itself'*. (emphasis added)

[44] A few instances of circumstances amounting to suspicious circumstances may be instructive. In *Wintle v. Nye* [1959] 1 All ER 552 where a solicitor who drafted the will for a 66 year old lady and who had been her legal adviser for several years was a substantial beneficiary under that will. In *Sarat Kumari Bibi v. Rai Sakhi Chand* 1929 AIR PC 45, where the writer of the will had taken a very active part in its preparation and had obtained a substantial benefit under it. In *Cushway v. Harris* [2012] EWHC 2273 (Ch), a solicitor drafted wills for his elderly aunts appointing himself executor and beneficiary of one-third of their combined estate, where both testators were in poor health, had poor eyesight and one probably lacked testamentary capacity; it was held that the gravest suspicions were aroused. In *Musgrove, In the Estate of* [1927] P. 264, the executrix kept the will in her possession for 16 years after learning of the testator's death but never proved it.

(Principles On Appellate Intervention On Findings Of Fact)

[45] At the hearing of an appeal, it is the appellant who must convince the court that his appeal should be allowed. Whilst an appeal is by way of rehearing, it must be appreciated that the Court of Appeal is not rehearing the witnesses; nor is it a retrial of the issues. An appeal is heard on the printed record of the trial. It is a rehearing on the printed record in the sense that the Court of Appeal only reads the printed record and rehears counsel whose arguments are limited to the printed record.

[46] Where the appeal relates to questions of fact, the principles on appellate intervention are well settled. An appellate court is always slow to interfere with the findings of fact by the trial court unless it had seriously misapprehended the facts to the prejudice of the party against whom the findings were made. The party attacking such findings bears the burden of convincing the appellate court that the misapprehension of the facts had resulted in a grave miscarriage of justice, and not just any error that does not go to the root of the matter or issue in question.

A [47] Where there is no question of misdirection by the trial court, an appellate court which is inclined to arrive at a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial court by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial court's conclusion (*Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41b (PC)).

B Put another way, however much an appellate court may be in an equal position with the trial court as to the drawing of inferences, it ought not to reverse the findings of fact unless it can be shown that the finding of fact is plainly wrong and that the decision ought to have been the other way.

C [48] The first question for determination is whether on the established evidence and relevant law, the circumstances alluded to amounted in law and in fact to suspicious circumstances. In the event that there were suspicious circumstances, the court should proceed to consider whether the plaintiffs have provided affirmative proof of the testator's knowledge and approval of the contents of the will so as to dispel the suspicious circumstances surrounding the making of the will.

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[49] First, we are in agreement with the observations of Baron Parke in *Barry v. Butlin* (*supra*) at p. 1091 that the rule relating to suspicious circumstances was not to be applied as a rule of law that the presence of a party taking under a will would necessarily invalidate the will. In this case however, the surrounding circumstances go beyond that. Kin was actively involved in the making of the will. Kin was also one of the main beneficiaries. Kin was also the 'conduit' between the testator and Ashok at the execution of the will. On these facts alone, the learned judge was justified in arriving at her finding that there were suspicious circumstances surrounding the making of the will. The plaintiffs' argument that the learned judge erred in focusing on a very narrow area in finding suspicious circumstances is without merit. The learned judge's finding of suspicious circumstances was supported by the evidence on the record. As such, this case is one in which the defendant was well justified in calling for the proof of the will. Accordingly, the evidential burden shifted upon the plaintiffs to dispel the suspicious circumstances.

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Whether The Plaintiffs Have Succeeded In Dispelling The Suspicious Circumstances?

H [50] In order to dispel the suspicious circumstances, the propounder must furnish affirmative proof of the testator's knowledge and approval which must be strong enough to satisfy the court in the particular circumstances. The greater the degree of suspicion, the stronger must be the affirmative proof to remove it (*Fulton v. Andrew* (1875) 7 HL 448 (*Wintle v. Nye* (*supra*)));

I *Tanner v. Public Trustee* [1973] 1 NZLR 68). For instance, affirmative proof

may be satisfied by showing that the will was read over by, or to, the testator when he executed it (*Sharp v. Hutchins* [2015] EWHC 1240; *Re Ashkettle* [2013] EWHC 2125) or where the testator gave instructions for his will and that the will was drafted in accordance with those instructions (*Fincham v. Edwards* (1842) 3 Curt. 63). On the other hand, if the testator merely casts his eyes over the will, this may not be sufficient (*Re Morris* [1971] P. 62). If the will is read over to the testator this must be done in a proper way so that the testator hears and understands what is read (*Fulton v. Andrew (supra)*; *Franks v. Sinclair* [2006] EWHC 3365). If a testator does not know and approve of any of the contents of a will which he executes the whole will is invalid (*Hunt, In the Goods of* (1875) 3 P. & D. 250; *Brown v. Fisher (supra)*; *Tyrell v. Painton (supra)*; *Meyer, In the Estate of* [1908] P. 353).

[51] The learned judge concluded that the plaintiffs had failed to dispel the suspicious circumstances because of the probability that the testator did not understand the contents of the will. We are of the view that the learned judge's surmise was misplaced. First, the learned judge overlooked the following established facts: (i) the testator wanted to make a will, (ii) the testator had instructed his grandson Kin in Cantonese on the terms of his will, (iii) Kin had conveyed the testator's instructions in English to the family lawyer Ashok, (iv) the testator had called Ms Chen to go to IJN to witness the execution of his will, (v) Ashok had prepared the will, (vi) Ashok explained the contents of the will in English to Kin, (vii) Kin translated the contents of the will to the testator in Cantonese, and (viii) the testator signed the will. The background facts leading to the execution of the will are sufficient to constitute proof of the testator's knowledge and approval of the will.

[52] Secondly, it must be noted that there was no challenge on the due execution of the will or that the will was tainted with fraud or undue influence or of any collusion between the plaintiffs and Ashok. Nor was there any challenge on the testator's testamentary capacity. Thirdly, the learned judge's ground for holding that the plaintiffs failed to dispel the suspicious circumstances is premised on the probability that the testator did not understand the contents of the will; which premise is set out in para. 33 of her written judgment that "Kin had agreed he was a conduit to the communication **and if there were a miscommunication between what deceased told him and what he told Ashok** neither Ashok nor deceased would know about it and nobody would know except him." In our considered view, the learned judge had arrived at her inference erroneously in that it was clearly based on speculation and conjecture as to the miscommunication underscored above. Such an inference is plainly unfounded and unsustainable in law and in fact and warrants appellate intervention. We are satisfied that on the established evidence, there was

A affirmative proof of the testator's knowledge and approval of the contents of his will. As such, the plaintiffs have succeeded in dispelling the suspicious circumstances surrounding the making of the will. Accordingly, we would answer the question in the affirmative. The decision of the learned judge on this issue is therefore set aside.

B *Whether Cl. 2 Should Be Constructed To Include The Testator's Current Assets (Rules Of Construction Of Wills)*

C [53] As a starting point, wills are construed according to the rules of construction that would be applicable as if they were being construed in a Court of Justice in England: ss. 30(3) Wills Act 1959; s. 100 Evidence Act 1950. The settled principles governing the construction of a will are as follows:

- D (i) The object of the court in construing a will is to ascertain the intention of the testator as expressed in his will when it is read as a whole in the light of any extrinsic evidence admissible for the purposes of construction;
- (ii) Any preconceived notions as to the testator's meaning should be discounted;
- E (iii) The court considers the circumstances of the testator when he made the will; and
- (iv) The court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said.

F [54] However, there has been an advent of 'the modern approach' to construction which was adopted by the Court of Appeal in *RSPCA v. Sharp* [2010] EWCA Civ 1474. The modern approach has since been restated by the U.K. Supreme Court in *Marley v. Rawlings (supra)*. According to the modern approach, the construction of wills follows the same approach as the interpretation of contracts and other documents. Lord Neuberger PSC expressed it as follows:

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H 17. Until relatively recently, there was no statutory provisions relating to the proper approach to the interpretation of wills. The interpretation of wills was a matter for the courts, who, as is so often the way, tended (at least until very recently) to approach the issue detached from, and potentially differently from the approach adopted to the interpretation of other documents.

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19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. ...

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20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial sense.

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[55] In concluding that the approach to the construction of wills should be the same as that for contracts and other documents, the UK Supreme Court in *Marley* acknowledged that wills differ from contracts in that the latter are bilateral, but rejected this as a reason for adopting a different approach. The UK Supreme Court also emphasised that this modern approach of interpretation by reference to the factual context can be equated with the "arm-chair principle" expounded by James LJ in *Boyes v. Cook (supra)* that, when interpreting a will, the court should place itself in the testator's arm-chair; in other words, the court considers the circumstances of the testator when he made the will.

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[56] There are, however, limits to the intentional approach to construction. A court exercising its power of construction is confined to the provisions of the will, and the available admissible evidence of intention. It will not indulge in mere speculation as to what the testator would have provided for had he thought about it. According to *Theobald on Wills* 18th edn at p. 309, such speculation comes in two forms. First, if the will simply does not deal with the situation, then the court cannot supply a provision, however clear the extrinsic evidence of the testator's intention. The court has no power to rewrite a will for a testator after his death in order to achieve a more sensible result or to give effect to what the testator would have wished had he not been under a misapprehension (*Re Bailey* [1951] Ch. 407 at 421). Second, where the will contains a provision, but the admissible evidence does not shed light on the testator's intention the court should not ascertain the intention of the testator by conjecture or guesswork (*Abbot v. Middleton* [1858] 7 HLC 68 at 114). Thus, where no evidence of intention exists, the court should give the words their natural and ordinary meaning.

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[57] It would also appear from *Marley (supra)* that the relevant words are to be constructed in the light of not only their natural and ordinary meaning but also *inter alia* the overall purpose of the document, any other provisions in the will and the facts known or assumed at the time of execution. An instance where ascertaining the meaning of the relevant word could only be done with reference to the language used elsewhere in the will occurred in

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A *Re Rowland* [1963] Ch. 1. By his will made on a printed will form the testator gave all his estate to his wife but “in the event of the decease of (my wife) preceding or coinciding with my own decease” the testator gave it to his brother and his nephew. The testator made his will before sailing for Fiji to serve as a medical officer in the South Pacific Health Service. Two years later, the testator and his wife were passengers on a small ship which sank in the Pacific with the loss of everyone on board. The Court of Appeal (by a majority) held that the word “coinciding” in this context bore its ordinary meaning of “simultaneous”, and did not mean “at about the same time” and as a result of the catastrophe.

C [58] In the course of his submission, learned counsel for the plaintiffs relied heavily on the presumption against intestacy. It is we think pertinent to revisit the basic principles relating thereto.

(What Is The Presumption Against Intestacy?)

D [59] The presumption against intestacy is a rule of construction. It is premised on the assumption that it is unlikely that a testator intended to die intestate, and that the court should lean against a construction which creates intestacy. This rule of construction described as “a golden rule” in *Re Harrison* (*supra*) by Lord Esher MR in the following passage at p. 394:

E There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule. I do not deny that this may be read in two ways, or that it requires that a blank should be filled up. But it may be read in such a way as not to amount to a solemn farce.

[60] This application of this rule of construction is, however, subject to the following common law principles (see *Halsbury’s Laws of Malaysia*, vol 11(2) para. 330.114-117).

- G (i) A testator may well intend to die partially intestate, for, when he makes a will, he is testate only so far as he has expressed himself in his will (*Re Edwards* [1906] 1 Ch 570, 574 CA). Thus, it is not in every case that courts should lean strongly against a construction that involves a partial intestacy (*Re Wragg* [1959] 2 All ER 717 at 723);
- H (ii) Where the will shows an intention of the testator to dispose of the whole of his property, but, as regards the interests created, two constructions are possible, according to one of which the will effects a complete disposition of the whole, but according to the other the will leaves a gap, the court inclines to the former construction (*Ibbetson v. Beckwith* (1735) Cas temp Talb 157 at 161; *Pinney v. Marriot* (1863) 32 Beav 643);
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- (iii) Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either wholly or partially intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion (*Edgeworth v. Edgeworth* (1869) LR 4 HL 35 at 40-41; *Re Harrison* (1885) 30 CH D 390 at 393, CA; *Royle v Hamilton* (1799) 4 Ves 437 at 439; *Re Henton* (1882) 6 Madd 343 at 348);
- (iv) Although the avoidance of intestacy is to be regarded in construing doubtful expressions, it is not enough to induce the court to give an unnatural meaning to a word, or to construe plain words otherwise than according to their plain meaning (*Re Benn, Benn v. Benn* (1885) 29 Ch D 839 at 847; *Re Edwards, Jones v. Jones* [1906] 1 Ch 570 at 574 CA; *Re Powell* [1918] 1 Ch 407);
- (v) The force of the presumption applies especially to property which the testator has at the date of the will, but is not so strong as regards property that he has not yet acquired at that date (*Hall v. Hall* (1892) 1 Ch 361 at 367 CA);
- (vi) Introductory statements setting out the testator's intention to dispose of all his worldly estate, or the appointment of executors, or the fact that the objects of the testator's bounty are his wife and all his children, his eldest son being treated alike with the rest, are strong indications in favour of a universal disposition of all the testator's property (*Re Methuen and Blore's Contract* (1881) 16 Ch D 696 at 698-699; *Ibbetson v. Beckwith* (*supra*); *Re Bassett's Estate* (1872) LR 14 Eq 54 at 57; *Hall v. Hall* (*supra*);
- (vii) The presumption applies with particular force to the construction of a residuary gift; where the residue is given, every presumption is made that the testator did not die intestate (*Philipps v. Chamberlaine* (1789) 4 Ves 51 at 59; *Booth v. Booth* (1799) 4 Ves 399 at 407; *Goodman v. Goodman* (1847) 1 De G & Sm 695 at 699);
- (viii) Where, according to one of several possible constructions of the words, a gift would be void for illegality and a partial intestacy would arise, then if there is no direct evidence of intention, the presumption against intestacy is an additional reason for an alternative construction that would avoid the illegality (*Montgomerie v. Woodley* (1800) 5 Ves 522; *Taylor v. Frobisher* (1852) 5 De G & Sm 191, at 199; *Re Edmondson's Estate* (1868) LR 5 Eq 389);
- (ix) It is not sufficient to satisfy the court that intestacy was not intended in order to oust the title of the persons claiming on intestacy; it must be shown distinctly that there are words in the will sufficient to constitute a gift of the property in question, expressly or by implication, to some particular donee, and the burden of proof is on the alleged donee (*Enobin v. Wylie* (1862) 10 HL Cas 1 at 18-21; *Hall*

- A *v. Warren* (1861) 9 HL Cas 420 at 433-435; *Drake v. Drake* (1860) 8 HL Cas 172 at 180; *Re Hobson* [1912] 1 Ch 626 at 634; *Re Wynn* [1983] 3 All ER 310);
- (x) If it is shown that testator has manifested an intention of making some gift of the property, and thus excluding the persons entitled on intestacy to a certain extent, there is an end of the claim of those persons and, if the gift *prima facie* extends to the whole property, the burden of proof is then shifted to those claiming on intestacy to show to what extent the gift is limited (*Midland Counties Rly v. Oswin* (1844) 1 Coll 74 at 78 per Knight Bruce V-C);
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- C (xi) If the words of the will are plain, they may not be taken in a sense different from that which they plainly bear, for the purpose of escaping from the consequences of invalidity under some rule of law, or even because it appears that the testator may have misunderstood the legal effect of the various species of gifts, and may have used language the legal interpretation of which may not carry out the intentions he had in mind (*A-G v. Williams* (1794) 2 Cox Eq Cas 387 st 388; *Re Hume, Public Trustee v. Mabey* [1912] 1 Ch 693; *Higgins v. Dawson* [1902] AC 1 at 11).
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- E [61] In light of the legal principles above, we now turn to the plaintiffs' submission. In essence, the plaintiffs' main argument is that cl. 2 should be given a contextual reading having regard to the circumstances of the testator's position at the time of the will and in the event of ambiguity what the testator is likely to have intended in the disposing of his properties. First, cl. 2 should not be read literally without regard to the manifest intention of the testator
- F to will all his properties to his two grandsons. Secondly, the inherent contradiction in cl. 2 read with the opening words in the preamble to cl. 1 and cl. 4 would clearly suggest that it was the testator's intention that all his current assets should go to the grandsons. It was also argued that the doctrine of presumption against intestacy would apply especially since the opening
- G words in the preamble to cl. 1 had manifested the testator's intention to give all his assets to his grandsons. As such, the words "All my movable and immovable future assets ..." in cl. 2 should be read as "All my movable, immovable and future assets ..."
- H [62] Underlying the plaintiffs' arguments is the premise that if cl. 2 is read literally, then the current assets would fall on intestacy and be inherited by persons whom the deceased had chosen not to bequeath any properties under the will. Learned counsel had taken great lengths to show the close relationship between the testator and the grandsons and the strained relationship between the testator and his eldest son Mun and Hong the
- I defendant. That close relationship was the premise of their arguments that the testator intended to benefit the grandsons to the exclusion of any other persons.

[63] In the first instance, the court should start with a perusal of cl. 2. In our view, cl. 2 is clear and unambiguous and does not permit of several possible constructions of the words. It refers to the testator's movable and immovable future assets. In this connection, we do not think that the opening words in the preamble to cl. 1 "... my properties/assets ..." can be construed to refer to all of the testator's properties. We are mindful of the fact that the will was drawn up by Ashok the family lawyer; that Ashok took instructions from Kin who in turn was instructed by the testator. In these circumstances, it is unlikely that there was any mistake or miscommunication between the parties. At any rate, the contents of the will was explained and translated to the testator; there was no question of the testator expressing any doubts or asking for clarification over the contents.

[64] This is not an obvious case where the construction of the will is doubtful. Neither is this a will that shows an intention of the testator to bequeath of the whole of his properties. To adopt the construction of cl. 2 in the manner suggested by the plaintiffs would be tantamount to re-writing the will. The plain words of cl. 2 and the will should not be interpreted in a sense different from that which they bear, even if it appears that the testator may have misunderstood the legal effect of the various species of gifts, and the legal interpretation of the words may not carry out the intentions he had in mind. We agree with learned counsel for the defendant that the presumption against intestacy applies in cases where there is obscurity or ambiguity in the language of the will. It cannot be used to strain the plain words to give them a meaning wider than intended.

[65] *In re Harrison (supra)*, the will was made using a law stationer's form which was partly in print and blanks being left in it which were to be filled up by the person who made use of it. In her will, the testatrix directed that all her debts and funeral and testamentary expenses should be paid by her executrix thereafter named and gave all her property "to and for her own use and benefit absolutely". In the subsequent paragraph the testatrix nominated her niece as the executrix. The main issue in that case was revolved on there being a blank in the will, and the court looked at the will to decide the matter. The ambiguity arose because the testatrix had not thought it necessary to draw a cancel line across the blank, or to repeat the niece's name, or to put any other name between the word "unto" and the words "to and for." Describing the language as "awkward and elliptical" Lord Esher MR applied the golden rule, *viz.*, that when a testator has executed a will in solemn form you must assume that he did not intend it to make a solemn farce, – that he did not intend to die intestate when he has gone through the form of making a will. Lord Esher MR concluded that the testatrix had intended to fill up the blank with the niece's name such that the words are capable of being read as a gift to the niece.

- A [66] *Re Harte (supra)* concerned a will drafted by solicitors which the trial judge found that whilst “there is tolerable clarity in the overall intention of the testatrix, as disclosed in her will, it is poorly drafted.” An ambiguity had arisen under the will whether the phrase “residuary estate” should be construed to include real property and not just personal property. The trial judge accepted that it is inherently unlikely that the testatrix and her late husband who predeceased her, had gone to the lengths of engaging a professional to whom they gave instructions to dispose their assets, would deliberately and purposely omit dealing with what was probably their most valuable asset, the family home.
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- C [67] In *Re Lee Chew Kuen, Decd (supra)*, the court in construing the will read the will with the addition in para. 4 of the will after the words “not surviving” the words “for a period of thirty days.” The addition was sanctioned by the court as the preceding para. 2 of the will after the words “... surviving me” carried the words “for a period of thirty days”.
- D [68] The first case related to a blank in a law stationer’s will form which was not filled up by the testatrix; the second case related to the ambiguity of the word “residuary estate”; and the third case related to the missing words in para. 4 of the will. In all these cases, the courts took the view that to read the will otherwise would be to manifestly disregard and act contrary to the intentions of the testator as can be gathered from the general scheme of the will and its context. In other words, in each case the courts considered the circumstances of the testator when he made the will. The above three authorities cited by learned counsel for the plaintiffs are therefore distinguishable on the facts and are of no aid to their submission. We have also considered and agree with the reasons given by the learned judge for holding that the doctrine of presumption is not applicable on the facts of this case.
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Concluding Remarks

- G [69] To sum up, we agree with the learned judge’s finding that on the evidence there were suspicious circumstances surrounding the making of the will. However, we did not agree with her finding that the plaintiffs have failed to dispel the suspicious circumstances. The learned judge’s findings of fact (see para. [51] above) showed that the testator had knowledge and approved of the contents of the will. Further, the learned judge’s finding that it is probable that the testator did not understand the contents of the will was flawed, such finding being based on speculation and without any foundation in fact (see para. [52] above). Consequently, we are of the view that the will has not been invalidated.
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- I [70] Insofar as the second issue relating to the construction of cl. 2 is concerned, we have for the reasons adumbrated above found that the reasons cited by the plaintiffs to persuade the court in construing cl. 2 to include current assets – by the inclusion of a comma and conjunctive ‘and’ to the

words “All my movable and immovable future assets ...” so as to construe the words to read as “All my movable, immovable **and** future assets ...” (additions bold) is without merit, especially as cl. 2 is plain, clear and unambiguous. The argument that such inclusion would render cl. 2 consistent with the general scheme of the will is also without merit. To accede to the plaintiffs’ suggestion would be akin to straining the plain words in the will by giving them a meaning wider than intended. As stated by the Federal Court in *David Wee Eng Siew v. Lim Lean Seng* [2014] 1 CLJ 299 (FC) at para. [21], any failure to draft such residuary clause or a comprehensive residuary clause will cause the remainder of his property to pass by intestate succession, a result that may not be the desire of the testator.

[71] Accordingly, the part of the High Court’s order dismissing prayer (2) of the amended OS is set aside. Prayer (2) is hereby allowed so that the will may be proved. However, we affirm the High Court’s order dismissing prayer (1) of the amended OS. For the foregoing reasons, the plaintiffs’ appeal is allowed in part. The order of the High Court on costs is also set aside. The costs of this appeal shall be borne by the parties respectively.

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